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No. 87-548

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* urging reversal of the decision of the United States Court of Appeals for the Eighth Circuit. In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of counsel for the Respondent to consent to the filing of a brief *amicus curiae* by the Chamber.

2. The Chamber is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations. It is the largest association of business and professional organizations in the United States.

3. The Chamber regularly represents the interest of its member-employers in important employment and labor relations matters, vitally affecting those interests, before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation. E.g., *Laborers' Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, ——— U.S. ———, 98 L. Ed. 2d. 936 (1988); *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. ———, 89 L.Ed. 2d. 616 (1986); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979).

4. The instant case presents an issue of great significance for the Court—i.e. the right of crossover employees to avoid displacement at the end of an economic strike by full-term strikers with more "seniority." Specifically, the Court must decide whether employees who wish to continue working during a strike, or wish to abandon a strike and return to work, have lesser rights upon termination of the strike than returning strikers with greater seniority. That is, must crossovers create vacancies for the strikers who remained out and were "permanently" replaced.

5. This issue is of vital concern to the Chamber and all its member-employers. Although this case arose under the Railway Labor Act, the Eighth Circuit relied on general labor law principles in reaching its conclusion, and, thus, the decision has an impact on any member-employer who has collective bargaining agreements with unions or who has refused to displace crossovers to make room for returning strikers with greater seniority. The granting of this motion will enable the Chamber to present the broader perspective of employers not covered by the RLA.

6. The Eighth Circuit's decision in the instant case represents a radical departure from what the Chamber, and its member-employers, have understood to be well-settled principles with regard to the reinstatement rights of strikers. If this Court adopts the same rationale, it will dramatically alter the balance of power in the collective bargaining system—tipping it in favor of unions—and severely impinge on an employer's ability to maintain business operations during an economic strike.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of the Petitioner Trans World Airlines.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

For the purpose of brevity, the Chamber respectfully requests that the Statement of Interest contained in the accompanying Motion for Leave to File a Brief *Amicus Curiae* be incorporated into this brief by reference.

SUMMARY OF THE CASE

Trans World Airlines, Inc. (TWA) and the Independent Federation of Flight Attendants (IFFA) were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984. Following written

notice under Section 6 of the Railway Labor Act (RLA) (45 U.S.C. § 156), negotiations for a new agreement began in March 1984 and proceeded, without success, through the steps required by the RLA.[1] On March 7, 1986, approximately two years after negotiations began, IFFA called a strike against TWA. For the purposes of this action, it has been assumed the strike was over only economic issues.[2]

In order to avoid interruption to its services, TWA operated with those flight attendants who wished to continue or resume working (so-called crossovers), and also hired additional replacements for the striking flight attendants to complete this workforce.

On May 17, 1986, the IFFA, on behalf of striking flight attendants, offered to return to work. There was no back-to-work agreement and no successor to the 1981-1984 Agreement. At that time, some 1,280 crossover flight attendants were working for TWA as replacements for the striking attendants. These crossover employees were employed by TWA along with approximately 1,200 permanent replacements hired during the first week of the strike, and an additional 1,600 replacements, 400 of whom were about to complete their training, when the union called off its unsuccessful strike.

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[1] While this case arose under the RLA, the holding is applicable to most unionized employers since the Eighth Circuit relied on National Labor Relations Act principles for its rationale.

[2] An economic strike protests wages, hours, or terms and conditions of employment. An unfair labor practice strike protests an employer's commission of unfair labor practices. While the employer is not permitted to hire permanent replacements during the course of an unfair labor practice strike, the employer does have the right to promote his legitimate business interests, and hire these replacements, during a strike over economic issues. *See*, C. Morris, *The Developing Labor Law*, 226 (1983).

IFFA commenced this action by filing a complaint on May 30, 1986 in the district court.[3] In evaluating the matter, the district court relied on the decision of *NLRB* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938) ("Mackay Radio"), and held that fully-trained new hires could not be displaced by economic strikers. However, it created an exception permitting strikers to displace the permanent replacements who had not quite completed their training by the May 17 date, but stayed its order for displacement of these flight attendants, pending the appeal.

With respect to the crossovers, the district court relied on the principles of *Mackay Radio* and upon *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) ("Erie Resistor"). In doing so, the court determined that none of the crossovers were subject to displacement by unreinstated strikers.

On appeal, the Eighth Circuit affirmed the district court's judgment that the new hires, other than the "trainees," were employed as permanent replacements and, therefore, were not subject to displacement by returning economic strikers. The court, however, reversed the district court's holding with respect to the crossovers, finding that

> . . . TWA may not accord crossovers permanent status and prevent full-term strikers from displacing crossovers with less seniority because such action

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[3] IFFA's complaint alleged two claims. First, it sought declaratory judgment and injunctive relief requiring TWA to reinstate 3,000 full-time strikers, displacing some 1,200 replacements hired during the first week of the strike, 400 replacements hired before May 17, 1986, and the crossovers, on the grounds that flight attendants to be displaced were not permanent replacements. Second, the union sought similar relief as to all replacements, alleging that TWA had no business justification for hiring permanent replacements.

impermissibly discriminates among union members based on the degree of their union activity.

819 F.2d at 843.

In doing so, the Eighth Circuit acknowledged that economic strikers are entitled to reinstatement as vacancies occur, but reaffirmed the position that employers need not discharge permanent replacements to make room for these striking employees. Purporting to rely on *Mackay Radio*, the court below held that only new hire permanent replacements, *not crossovers*, could retain their jobs at the end of the strike, and only if they completed their training before the end of the strike.

SUMMARY OF ARGUMENT

The decision of the court below must be reversed because, in its holding, the Eighth Circuit has dramatically limited the rights of employees who choose not to participate in an economic strike. Essentially, the decision below establishes a novel and irrational departure from the long accepted relationships between management, labor strikers and non-strikers. The practical effect of the Eighth Circuit's unprecedented decision is to tip the balance of bargaining power in favor of unions and to eviscerate one of the employer's principle self-help weapons in response to a strike—the right to retain employees who choose to work during a strike.

In addition, the lower court's decision also creates the anomaly that employees newly hired as replacements for strikers after the strike begins need not yield to strikers' job claims, but employees with years of service, who exercised their right not to join the strike, must sacrifice their jobs to these same strikers. Thus, the Eighth Circuit's decision limits employee incentive to return to work —prolonging a divisive situation—and eroding the underlying bargaining structure.

Finally, the result of the decision below is to force employers to look outside the bargaining unit to maintain operations during a strike. The impact on the collective bargaining system as a whole is harmful. Thus, for this reason and those previously noted, the decision of the Eighth Circuit must be reversed.

ARGUMENT

I. SCOPE AND IMPLICATIONS OF THE ISSUE

The success of the collective bargaining process has always depended on the balance of pressures on the negotiating parties to reach an agreement. The history of this relationship between employers and their economic strikers reveals a balancing of two basic considerations: first, that employees need not fear a retalitory denial of the opportunity to work as to render illusory their right to strike for better economic conditions; second, that the employer should be free to continue operating its business in the face of an economic strike.[4] Under this system, employers have generally been made more conciliatory by the potentially disasterous effects of a strike, and employees have been restrained by the knowledge that they can be permanently replaced.[5]

Now, however, in broad language, not limited to a specific factual situation or to the Railway Labor Act, the Eighth Circuit has swept away this relative stability in the framework in which collective bargaining takes place. Their decision tips the balance of economic power in favor of unions whose actions may or may not coin-

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[4] C. Morris, *The Developing Labor Law*, 226 (1983).

[5] In *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Court first announced that an employer could offer permanent replacement status to those individuals who had replaced economic strikers.

cide with the interests and freedom of choice of all employees.

The unfortunate meaning of the lower court's decision is that economic strikers are entitled not only to vacancies existing at the time they seek reinstatement—a rule under which both employers and unions have long operated.[6] Rather, under the Eighth Circuit's holding in this matter, an economic striker is entitled to *displace* any less senior employee who, in order to preserve his job, has exercised his protected right not to engage in concerted activities or to return to work during a strike.

This new rule established by the lower court is not based on any reasonable extension of established precedent thought necessary to respond to changing economic realities. Instead, the lower court clearly misunderstood, and misapplied, well established authority with the result of effecting considerable change in the balance of power between parties during a strike. Thus, the Court must reverse the holding of the Eighth Circuit and re-affirm the longstanding practice of allowing crossovers to continue their employment after a strike.

II. THE LOWER COURT'S DECISION WOULD SUBSTANTIALLY INTERFERE WITH AND ALTER THE BALANCE OF POWER IN THE COLLECTIVE BARGAINING SYSTEM

A. The Employer Has The Right To Hire Replacements During An Economic Strike

A fundamental feature of our free collective bargaining system is the right of an employer to hire strike replacements and maintain operations during an economic strike. It is this well-settled rule that was announced in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). In *Mackay Radio*, the Court held that:

[6] *Id.*

> An employer . . . has the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those *hired to fill the places of strikers*, upon the election of the latter to resume their employment, in order to create places for them . . . [It is] not an unfair labor practice . . . to reinstate only so many of the strikers as there [are] vacant places to be filled."

304 U.S. at 345-46 (emphasis added).

With this ruling, the Court recognized both the right of employers to hire strike replacements *and* the right of employees who choose not to join the strike—so-called crossovers—to continue their employment after a strike.

For nearly fifty years, until the lower court's decision in this case, employers relied on the Court's instruction that they were not bound to discharge those *hired to fill the places of strikers*. Based on this right, then, the usual and lawful method of obtaining workers during a strike was to inform employees that they would be replaced if they went on strike and to offer permanent employment to replacements. This system was consistent with the doctrine established in *Mackay Radio* and satisfied the needs of both employees and employers. The employer is able to maintain a workforce to operate his business *and* the employee has the freedom to exercise his choice whether to participate in concerted activity or continue with employment.

By deviating from this general rule, the lower court impinges on the delicate balance of rights that the Court in *Mackay Radio* sought to preserve. By denying crossovers permanent replacement status, the Eighth Circuit's ruling virtually eliminates any incentive junior employees have to work during a strike. Once the employee chooses to work during the strike—as a means of assuring that his job will be secure—he runs the risk of displacement at the strike's end. Thus, the decision of the court below

imposes a severe penalty on employees for exercising their statutory right not to engage in concerted activity.

To combat the grave consequences of this situation, employees who wish to work during a strike, to protect their jobs, will be forced to resign their employment, sacrifice their seniority, and seek re-employment as new hires.[7] Only with this status as a "new hire" can the employee protect himself against displacement at the strike's end.

B. Unions Should Not Be Allowed To Use An Economic Strike To Poison The Collective Bargaining Process

While an economic conflict is an essential and legitimate feature of our collective bargaining system, a strike should not prove occasion for terminating the bargaining relationship. The strike is the means of resolving the dispute—not for destroying the underlying bargaining structure.[8] The Court has recognized both the importance of the bargaining structure and the devastating impact particular tactics will have on this structure, and, for this reason, has limited the means permitted to secure permanent replacements.[9]

In *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221 (1962), the Court held that grants of superseniority to replacement employees during an economic strike went

[7] The unlikely prospect of that event highlights the illogic of the holding below, as well as the extent to which it would impermissably interfere with the right of an employer to operate during a strike and the right of employees to refrain from engaging in concerted activity.

[8] This has come to be known as the "bounded conflict" principle—a form of limited warfare, cabined by a set of rules to make sure the bargaining relationship survives the conflict. *See*, S. Estreicher, *Strikers and Replacements*, 3 Lab. Law. 897 (1987).

[9] The concern in these instances should be on making sure the "costs" associated with conflict do not threaten the survival of the bargaining structure. *Id.* at p. 898.

beyond the right of replacement sanctioned in *Mackay Radio*. According to the Court, *Mackay Radio* does not authorize replacement programs which "create cleavage in the plant continuing long after the strike ended." 373 U.S. at 316.[10]

However, the Eighth Circuit's reliance on *Erie Resistor* is ill-founded, as this case had nothing whatsoever to do with entitlement to reinstatement. Rather, the concern in *Erie Resistor* was post-reinstatement treatment which operates to fix active employees into two categories: those that went on strike and those who did not. No such post-reinstatement discrimination results from retention of crossovers. These employees are merely being allowed to retain their jobs during the course of an economic strike. Despite the lower court's fear, the level of divisiveness in the work force will be much greater if strikers have the right to displace these crossovers.

Moreover, the hostility between factions of employees—depending on their original choice of whether to participate in the strike—will have a devastating impact on their ability to act as an organized force in future collective bargaining proceedings. The lower court has simply not recognized that a reinstatement policy that favors striking employees over crossovers creates a far more explosive situation than the mere retention of the crossovers. By allowing displacement of crossovers at the strike's end, tl court below endangers the ability of the workforce to act as a unified bargaining group and, thus, jeopardizes future labor/management negotiations.

Finally, the obstruction of this normal process of combatting strikes reduces the employers' ability to avoid

[10] Similarly, in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Court reiterated its rule that there are limits to the economic weapons parties may use precisely because they would have a traumatic impact on the bargaining relationship once the strike ends.

strikes as well as to weather them. *See, Belknap, Inc.* v. *Hale*, 463 U.S. 491, 515 n.2 (1983) (Blackmun, J. concurring). To curtail the self-help available, and to focus it on parties outside the bargaining relationship, changes the atmosphere in which negotiation occurs and makes it less likely to succeed.[11]

III. THE LOWER COURT'S DECISION IS UNSUPPORTED BY LAW OR LOGIC

A basic flaw in the lower court's decision is its erroneous foundation. To begin with, employees who elect not to strike or who work during a strike simply need not be treated as replacements in order to retain their jobs at the end of the strike. *See e.g., P.C. Food Markets, Inc.*, 282 N.L.R.B. No. 122, 124 L.R.R.M. 1174 (1987). Therefore, crossover employees have not commonly been spoken of as "replacements" except as they may have been intended to be included in that term for the purpose of describing those who may retain their jobs upon termination of a strike.

Secondly, employees who offer to return during a strike have a *continuing right to reinstatement* when vacancies occur. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Yet the lower court's determination effectively destroys both principles, since by allowing the replacement of non-strikers, the court has mandated that the reinstatement of crossovers will be only be temporary.

The lower court's decision also ignores a third principle—namely that there is no statutory requirement that strikers be reinstated in seniority order absent a back-to-work agreement to that effect. *P.C. Food Markets, Inc., supra*, 282 N.L.R.B. No. 122, *slip op.* at 6; 124 L.R.R.M.

[11] In *Burlington Northern Railroad* v. *Brotherhood of Maintenance of Way Employees*, the Court recognized that the availability of self-help measures increases the incentive for settling disputes short of disruptive strikes. 55 U.S.L.W. 4276 at 4582 (U.S. April 28, 1987).

at 1176. Although the lower court found that TWA had no contractual obligation to reinstate strikers in any particular order, the result of the decision implies such a right exists as matter of law.[12] Thus, because the Eighth Circuit has effectively ignored these well-established principles—and altered the balance of power between the parties in an economic strike situation—reversal by this court is necessary to combat this dramatic change in the law.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to reverse the judgment of the Eighth Circuit and hold that crossover employees cannot be displaced by striking employees with greater seniority at the conclusion of an economic strike.

Respectfully submitted,

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Date: May 26, 1988

[12] In the alternative, the law is clear that returning strikers cannot be deprived of their prestrike seniority. *NLRB* v. *Anvil Products, Inc.*, 496 F.2d 94, 95 (5th Cir. 1974). However, in the instant matter, the employer is not depriving the strikers of their seniority, but is merely restricting their ability to use seniority as a means of displacing strike replacements.